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No. 99-929

In The

Supreme Court of the United States

REBECCA McDOWELL COOK,

Petitioner,

v.

DONALD J. GRALIKE, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF JAMES MADISON CENTER FOR FREE SPEECH AS AMICUS CURIAE IN SUPPORT OF RESPONDENT DONALD J. GRALIKE SUGGESTING AFFIRMANCE

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INTEREST OF AMICUS

The James Madison Center for Free Speech is an internal educational fund of the James Madison Center Inc., a not-for-profit corporation.[1] The purposes of the James Madison Center are to promote, through educational activities, respect for the rights of freedom of speech and freedom of association guaranteed by the First Amendment to the United States Constitution, and to defend the rights of freedom of speech and freedom of association when threatened by government action.

SUMMARY OF THE ARGUMENT

The right of free speech is deeply embedded in our nation's history. The Founding Fathers, particularly James Madison, had this right in mind when they drafted the First Amendment. To protect this right, the First Amendment demands that Congress shall make no law abridging the rights of free speech. Thus, the freedom of speech is a withholding of power from the government.

Despite this unequivocal denial of power, the Petitioner, through its ballot labels, abridges the free speech rights of candidates by forcing the candidate to speak on

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[1] The parties have consented to the filing of this brief and their letters are on file with the Clerk of the Court. Pursuant to Rule 37.6, *amicus* states that no counsel for any party has authored this brief in whole or in part, and no person or entity other than *amicus* made a financial contribution to the preparation or submission of this brief.

an issue, or, if the candidate refuses to speak, the ballot label speaks for him.

The individual candidate's free speech rights enjoy the full protection of the First Amendment and are not subservient to the people's collective right of free speech. At the heart of James Madison's view of the First Amendment lies the principle that each person should decide for himself the ideas and beliefs deserving of expression, consideration, and adherence. The First Amendment ensures that the government will not infringe on the individual's autonomy to choose the content of his own message.

ARGUMENT

I. THE RIGHT OF FREE SPEECH ENSHRINED IN THE FIRST AMENDMENT IS A RIGHT BELONGING PRIMARILY TO THE INDIVIDUAL.

A brief examination of the First Amendment's origins and its purposes provides the best defense to the Petitioner's erroneous argument that ballot labels do not violate the First Amendment.

The principal drafter of the First Amendment, James Madison, believed that individuals possessed a property right in their ideas and opinions just as they possessed a property right in their material goods. Special protection from government interference with the ability to transmit ideas and opinions was needed, however. James Madison explained that the purpose of a bill of rights was

> to limit and qualify the powers of Government, by excepting out of the grant of power those cases in which the Government ought not to act, or to act only in a particular mode.

James Madison, Speech to House of Representatives (June 8, 1789), in Creating the Bill of Rights: The Documentary Record from the First Federal Congress 81 (Helen E. Veit et al. eds., 1991).

James Madison understood freedom of speech as a type of property right inhering in individuals. He wrote that every individual has "property in his opinions and the free communication of them." James Madison, Property, Nat'l Gazette (March 27, 1792), reprinted in Robert A. Rutland, et al., eds., 14 The Papers of James Madison 266 (Virginia 1983). As Thomas Emerson put it, "the purpose of society, and of its more formal aspect the state, is to promote the welfare of the individual." Emerson, Toward a General Theory of the First Amendment, 72 Yale L.J. 877, 880 (1963). While a "society may seek to achieve other or more inclusive ends," such as justice, equality, or an informed electorate, it generally may not do so by suppressing individual expression, which must be afforded "full protection" under the First Amendment. *Id.*; Emerson, The System of Freedom of Expression 17 (1970). The function of the First Amendment, then, is not to promote a collective interest in self-governance, but to prohibit regulation of a property interest – free speech – by the government.

James Madison's view of the First Amendment was formed in part from John Locke's natural rights theory that rights derive from the concept of liberty. The most basic meaning of liberty is self-determination – a person

is free if he is the author of his own thoughts and actions. Therefore, freedom has two important aspects. In a positive sense, it means the ability to actively determine one's own thoughts and actions. In a negative sense, it means independence from external forces.

Freedom, then, consists of the ability to determine one's own thoughts without interference from the government and others. Under Madison's view of the First Amendment, external forces may only regulate speech to prevent harm to life and property of others. Neither the government, nor the people, should have the power to control an individual's thoughts and beliefs in order to promote some current notion of democratic deliberation.

The collective right rationale for the First Amendment views speech as a means for promoting a particular form of government – in this case, a government limited by term limits – or as a means for promoting an important societal interest – better informed voters. Thus, rather than a fixed right to be protected from governmental interference, speech can be abridged if necessary to reach a collective good as defined by the majority. And as there are no inherent limits to desirable societal interests, a danger of this rationale is that it becomes a basis for justifying more regulation of speech.

This rationale views the First Amendment as a problem to be gotten around whenever it interferes with constructive social policy goals; the First Amendment becomes an obstacle or a loophole to government regulation. *See generally,* Bopp & Coleson, *The First Amendment is Not A Loophole: Protecting Free Expression in the Election Campaign Context,* 28 UWLA Law Rev. 1 (1997). This

approach begins with the proposition that the First Amendment is not an absolute and that many societal interests exist which permit speech to be regulated or punished.

Citing public apathy and ignorance, the Petitioner argues that regulation of speech through ballot labels is important to the functioning of our democracy. However, James Madison's rationale for protecting speech – preventing government interference – provides natural suspicion of this motive. Characterizing the interests of a majority as societal interests, and regarding the Petitioner as only implementing these interests, does not lessen the suspicion.

The Petitioner's idea of the First Amendment as a collective right of self-governance is not only completely at odds with the Madisonian view that free speech is an individual right, but naturally forms the basis of her argument that ballot labels are not compelled speech.

II. BALLOT LABELS COMPEL SPEECH AND, THEREFORE, INFRINGE ON THE CANDIDATE'S INDIVIDUAL SPEECH RIGHTS.

The logical outcome of the Petitioner's First Amendment rationale is that speech, as an instrument of the collective good, may be regulated if necessary to advance some cause of social reform. The tendency of those that hold the collective right rationale of the First Amendment is to jump to the conclusion that the First Amendment serves only the collective right rationale. Therefore, regulations consistent with the collective right of self-governance cannot be otherwise challenged under the

First Amendment. Such a view of the First Amendment enables one to ignore the free speech rights of the candidate. What is good for the public or the people trumps individual rights. However, the Court has acknowledged that the First Amendment "serves not only the needs of the polity but also those of the human spirit – a spirit that demands self-expression." *Procunier v. Martinez*, 416 U.S. 396, 427 (1974). A Madisonian view of the First Amendment requires analysis of the constitutionality of Missouri's Article VIII from the perspective of the *candidate*.

With the adoption of the Australian Ballot system came state-prepared ballots. The idea of a government-printed ballot was seen as a progressive reform designed to reduce a variety of fraudulent election practices. Its end was to make elections better express the free choice of voters by increasing voter secrecy, reducing the corruption of party politics, and protecting the integrity of the voting process. To that end, states assumed the responsibility of preparing the ballot for the convenience of the voters and to avoid election fraud.

The ballot serves more than purely expressive purposes. Its primary purpose is to record voter preferences for tabulation. *See Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 363 (1997) (stating that "[b]allots serve primarily to elect candidates, not as forums for political expression."). But, the First Amendment dictates that the state cannot design the state-prepared ballot in a way that favors certain candidates or ideologies over others. Candidates do not check their First Amendment rights at the door when running for office. When viewed as a property interest in the free expression of ideas and thoughts, the First Amendment does not permit the collective good to

trump the rights of individuals, whether they are candidates for office or single pamphleteers.

This Court has recognized the importance of the First Amendment's protection of the individual's free speech rights. Previous cases have struck down government attempts to regulate an individual's right to speak in order to promote a collective public speech right. Therefore, the ballot label provision at issue here imposes a similar burden on candidates' First Amendment freedoms as previous government attempts to compel speech. *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995) (state cannot force parade sponsor to include unit whose message it did not wish to choose or carry); *Riley v. National Federation of the Blind of North Carolina*, 487 U.S. 781 (1988) (charities need not disclose percentage of contributions for administration and fundraising expenses); *Pacific Gas & Electric Co. v. Public Utilities Comm. of California*, 475 U.S. 1 (1986) (utility cannot be forced to carry bill inserts provided by energy conservation public interest group); *Wooley v. Maynard*, 430 U.S. 705 (1977) (vehicle owner cannot be compelled to display state motto "Live Free or Die" on license plate); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (newspaper cannot be forced to publish response to allegedly libelous article); *West Virginia Bd. of Education v. Barnette*, 319 U.S. 624 (1943) (school child cannot be compelled to salute flag).

The guiding principle behind these cases is that the speaker has the right to tailor the speech or to not speak at all. This Court asserted "the proposition that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely

and the right to refrain from speaking. . . . " *Wooley*, 430 U.S. at 714; *see also Riley*, 487 U.S. at 796-97 (stating that there is "some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without constitutional significance, for the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what not to say."). Therefore, the people, through the state's ballot, may not decide which issues have been ignored and slighted by candidates and thus must be placed on the ballot so that the public can hear viewpoints that would otherwise be obscured. This decision is not left to the people, but to the candidate for two reasons.

First, this right not to speak applies not only to expressions of belief or opinion, but also to statements of fact the speaker would rather avoid. *See Riley*, 487 U.S. at 797-98 (stating that both compelled statements of fact and compelled statements of opinion are forms of compulsion that burden the First Amendment right to speak). Contrary to the Petitioner's argument, it matters not that the ballot label may be truthful[2] – the speech is still

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[2] It is not difficult to see the problems inherent in ensuring labels are not misleading. Labels could be drafted by the majority to gain electoral advantages. For example, if a group favoring the strengthening of the U.S. Department of Education were in the majority, it could pass a measure that requires candidates who do not support a law appropriating more money to the Department to run with a notation that states, "REFUSED TO STRENGTHEN EDUCATION." Similarly, a pro-life group could put a label such as "REFUSED TO STOP THE MURDERING OF INNOCENT BABIES" on candidates, while environmental groups could label candidates with the notation, "REFUSED TO STOP POLLUTION."

compelled. *See McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995) (statute compelling disclosure of identity on documents distributed to influence voters violated the First Amendment); *Talley v. California*, 362 U.S. 60 (1960) (ordinance making it illegal to distribute any type of anonymous handbill violated the First Amendment).

Analogizing the ballot labels at issue in this case to nicknames, party designations, or residencies provides no justification. A candidate's choice to accept a party association is a voluntary act, whereas the imposition of a notation next to the candidate's name on the ballot is not. The notation is forced speech.

Groups that use the initiative process to place notations on the ballot force candidates to run on a given issue. Candidates then become powerless to shape their own messages because they are required to declare a position on an issue. Whichever stance the candidate takes,[3] he gets a ballot notation. The candidate is thus prevented from deemphasizing the issue.

Choosing what to emphasize in a campaign is the type of speech that falls within the First Amendment's purview and outside the reach of the government or the people. In *Mosely*, the Court stated that government "may not select which issues are worth discussing or debating in public facilities." *Police Dept. v. Mosely*, 408 U.S. 92, 96 (1972). Therefore, a candidate's free speech rights include

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[3] Ballot notations that involve complex issues that are not susceptible to a binary, simplistic presentation provide an additional problem for candidates. The candidate is faced with only two unsatisfactory choices that do not reflect the universe of positions on the issue.

when, if at all, to address an issue, how to frame the issue, and the determination of the issue's importance or priority in the campaign's overall message. In James Madison's view then, an individual's ownership of his ideas and opinions necessarily requires dominion over the expression of those ideas and also over commitments to others regarding these ideas. *See Barnette*, 319 U.S. at 634 (stating that, "[t]o sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind.").

The people are not left without ways to speak and comment on candidates' positions on issues. Issue advertisements or independent expenditures, by groups that are concerned about an issue, would serve the same stated purpose as ballot labels yet allow candidates to address, or ignore, the issue.

Second, the people's desire to receive "information" does not trump a candidate's free speech rights. Such information comes at the most crucial moment – the moment of decision. It is contradictory that the ballot label requires the candidate to provide information at the precise moment voters cast their ballots, while candidates themselves, are prohibited from campaigning within a certain distance of the polling place in order to give voters the information the candidate wants to provide.

III. IF A LAW IS REPUGNANT TO THE CONSTITUTION, THE COURT SHOULD NOT UPHOLD IT MERELY BECAUSE IT REFLECTS THE POPULAR WILL OF THE PEOPLE.

The Petitioner submits that Article VIII is not violative of the First Amendment because it is the people's message, rather than the government's. This distinction is without merit. *See West Virginia State Bd. of Education v. Barnette*, 319 U.S. 624, 638 (1943) ("One's right to life, liberty, and property, to free speech . . . may not be submitted to vote; they depend on the outcome of no elections.").

The very premise of judicial review, the system of checks and balances, and federalism is to protect the liberties of individuals against unconstitutional acts imposed by the majority through the government. *See, e.g., Martin v. Hunter's Lessee*, 14 U.S. 304, 344 (1816) ("The courts of the United States can, without question, revise the proceedings of the executive and legislative authorities of the States, and if they are found to be contrary to the Constitution, may declare them to be of no legal validity."); *Marbury v. Madison*, 5 U.S. 137, 179 (1803) ("It is emphatically the province and duty of the Judicial Department to say what the law is.").

The popularity of laws or amendments has been no obstacle to the willingness of this Court to strike down unconstitutional laws. *See, e.g., Saenz v. Roe*, 526 U.S. 489 (1999) (holding a portion of California's attempt at welfare reform violated the Constitution, even though a great majority of citizens supported the reforms); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (Court striking down the

Religious Freedom and Restoration Act, a law supported by many religious groups).

Similarly, the Supreme Court has not shied away from striking laws adopted by initiative that are unconstitutional "because the voters may no more violate the Constitution by enacting a ballot measure than a legislative body may do so by enacting legislation." *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 295 (1981); *see also Romer v. Evans*, 517 U.S. 620 (1996) (overturning Colorado's Amendment 2, a law enacted by initiative which prevented localities from adopting special protections for homosexuals); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995) (overturning Arkansas's congressional term limits, which were enacted by initiative); *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994) (striking down an Oregon constitutional amendment adopted by initiative limiting judicial review of punitive damages). Thus, any contention that Missouri's amendment is constitutional and entitled to deference, because it is a popular reflection of the will of the people, must fail.

The right to free speech is to be specially guarded against the democratic political process because of its unreliability and the First Amendment's place at the foundation of our democracy. The people of Missouri may not use the ballot to violate candidates' First Amendment rights any more than the government may.

> For the First Amendment does not speak equivocally. It prohibits any law "abridging the freedom of speech, or of the press." It must be taken as a command of the broadest scope that explicit

> language, read in the context of a liberty-loving society, will allow.

Bridges v. California, 314 U.S. 252, 263 (1941).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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